FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1413

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare;
MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M. STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare,

Petitioners,

vs.

LOUISE BOND, individually and on behalf of her minor children;
ROSE EDWARDS, as President, NEW DAY WELFARE ORGANIZATION, an unincorporated association;
SARA JUDE, as President, GARY AFDC MOTHERS' ORGANIZATION WELFARE RIGHTS ORGANIZATION, an unincorporated association;
NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association; individually and on behalf of all others similarly situated,

Respondents.

BRIEF OF PETITIONERS

THEODORE L. SENDAK
Attorney General of Indiana

DONALD P. BOGARD
Executive Assistant Attorney General

DAVID A. MILLER
Deputy Attorney General

Attorneys for Petitioners

Office of Indiana Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-5514

Central Publishing Company, Inc., Indianapolis, Ind. 46206

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) has been reported as *Bond v. Stanton,* 528 F.2d 688 (7th Cir., 1976). A copy of said opinion has been appended to the Petition

for Writ of Certiorari (hereafter Petition) at page A-1. The January 13, 1975, Order of the United States District Court for the Northern District of Indiana, Hammond Division (hereafter District Court) in *Bond v. Stanton,* Civil No. 73 H 184, has not been officially reported, but is appended to the Petition at page A-8.

Two Orders of the Seventh Circuit dated June 3, 1975, and February 19, 1976, denying applications for attorney fees in this cause have been appended to the Petition at pages A-11 and A-13 respectively.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 19(1) (b) of the Rules of this Court, to review an opinion of the Seventh Circuit which has rendered a decision on an important federal-state question in a way in conflict with the United States Courts of Appeals for the Third Circuit, the Fourth Circuit, the Fifth Circuit, and the Sixth Circuit.

The decision of the Seventh Circuit was entered on January 7, 1976. The Petition was timely in that it was filed on April 6, 1976, which was prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101 (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

42 U.S.C. § 1983 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Amendment to the Constitution of the United States is an absolute bar to an award of attorney fees against officials of the State of Indiana when such an award is made against them in their official capacities.

STATEMENT OF THE CASE

The Petition herein arose from an affirmance by the Seventh Circuit of an Order issued by the District Court in the case of *Bond v. Stanton,* Civil No. 73 H 184, whereby the District court ordered the Petitioners herein to pay $2,366.00 in attorney fees for Respondents' (Plaintiffs below) counsel.

Facts Material to the Consideration of the Questions Presented

The original lawsuit was commenced on July 23, 1973, when Plaintiffs filed a complaint in the District Court alleging that Indiana's Early and Periodic Screening, Diagnoses and Treatment (hereafter EPSDT) program was unacceptable under the statutes and regulations of the Congress of the United States, and seeking an injunc-

tion mandating the State to institute an acceptable EPSDT program.

The action by Plaintiffs was brought pursuant to 42 U.S.C. § 1983, 28 U.S.C. §§ 1343 (3) and (4), 28 U.S.C. § 2201, 28 U.S.C. § 2202 and 28 U.S.C. 1331, and was decided on cross motions for Summary Judgment in favor of Plaintiffs. 372 F. Supp. 872 (N.D. Ind., 1974). The District Court held that the State of Indiana through its Welfare Department had not complied with a provision of the Social Security Act, 42 U.S.C. § 1396d (a) (4) (B), as of March 1, 1974. The Court permanently enjoined Defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them "from continuing to administer EPSDT in violation of 42 U.S.C. § 1396d (a) (4) (B) and the regulations established thereunder, 45 CFR 249.10(a) (3)," and further, "Defendants are ordered to have a program of Early and Periodic Screening Diagnoses and Treatment (EPSDT) in effect in every county by July 1, 1974."

The decision of the District Court was affirmed by the Seventh Circuit on October 30, 1974. 504 F. 2d 1246. Certiorari was denied on March 17, 1975. 95 S. Ct. 1415 (1975). In the meantime, the District Court, on January 13, 1975, entered its Order granting attorneys' fees to Plaintiffs' attorneys in the amount of $2,366.00, finding that there was a lack of good faith on the part of the Defendants in implementing the EPSDT program, and holding that the Eleventh Amendment did not bar an award of attorneys' fees against state officials. The Seventh Circuit affirmed that Order on January 7, 1976.

In an order dated June 3, 1975, issued upon a request for attorneys' fees by Plaintiffs following the appeal by the Petitioners herein of the case on the merits, the Seventh

Circuit stated that the case was ". . . not an appropriate case for utilization of the 'common benefit' or 'common fund' theory," and further held that there was no evidence that the Defendants were in bad faith in prosecuting an appeal. Petition Appendix, page 11.

On February 19, 1976, the Seventh Circuit denied Plaintiffs' request for attorneys' fees following the appeal by Petitioners of the award of attorneys' fees by the District Court. Petition Appendix, page 12.

ARGUMENT

I

The Eleventh Amendment is an Absolute Bar to an Award of Attorney Fees Against State Officials Sued in Their Official Capacities in the Absence of any Statute Authorizing Such an Award.

This case has changed somewhat between the filing of the Petition and this brief on the merits due to the intervening decision of this Court in *Fitzpatrick v. Bitzer,* slip opinion, June 28, 1976. However, while that decision does eliminate the Eleventh Amendment in some cases involving states and an award against them for attorney fees, it solidifies the Petitioners' position that the decision of the Seventh Circuit under review herein must be overruled.

The Petitioners would submit that attorney fees are not chargeable against them due to the applicability of the Eleventh Amendment to the Constitution of the United States, which provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign State."

The issue of the Eleventh Amendment bar to an award of attorney fees against state officials has been decided differently by various Circuit Courts of the United States Court of Appeals. In this case the Seventh Circuit held that the Eleventh Amendment is not a bar, and stated that it considered itself ". . . bound by the Supreme Court's

summary affirmance in *Sims v. Amos,* 340 F. Supp. 691 (M.D. Ala.), aff'd, 409 U.S. 942 (1972)." However, the decision of the Seventh Circuit to follow the summary affirmance of *Sims v. Amos,* 340 F. Supp. 691 (M.D. Ala., 1972) is contrary to decisions of the Third, Fourth, Fifth and Sixth Circuits, and is contrary to this Court's summary affirmance of *Murgia v. Commonwealth of Massachusetts Board of Retirement,* 386 F. Supp. 179 (D.C. Mass. 1974) aff'd 421 U.S. 972 (1975).

In the case of *Jordan v. Gilligan,* 500 F. 2d 701 (6th Cir., 1974) cert. denied 95 S. Ct. 1996 (1975), the Sixth Circuit stated, at pages 709 and 710:

> "Careful study of the Edelman opinion leads us to conclude, as did the Third Circuit, that the Eleventh Amendment prohibits the awarding of attorneys' fees against unconsenting sovereign states . . . The Amendment bars any award which is 'measured in terms of monetary loss resulting from a past breach of legal duty on the part of the Defendant state officials.' *Edelman, supra,* 94 S. Ct. at 1358."

Gilligan was reaffirmed in *Taylor v. Perini,* 503 F. 2d 899, 901 (6th Cir., 1974) vacated on other grounds, 421 U.S. 98 (1975):

> ". . . The propriety of an award of attorneys' fees by a federal court against a state or its officials acting in their official capacity has been settled in this Circuit by our recent holding in *Jordan v. Gilligan,* 500 F. 2d 701 (6th Cir., 1974) that such an award is barred by the Eleventh Amendment."

Accord, *Hallmark Clinic v. North Carolina Department of Human Resources,* 519 F. 2d 1315 (4th Cir., 1975). Both *Taylor* and *Hallmark Clinic* are cases arising under 42 U.S.C. § 1983, as is the case at bar.

The Fifth Circuit has found the Eleventh Amendment to be a bar to an award of attorney fees against state officials in the case of *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department,* 496 F. 2d 1017 (5th Cir., 1974), cert. denied 420 U.S. 926 (1975). In addition, the Third Circuit has indicated agreement with the principle in *Skehan v. Board of Trustees of Bloomsburg State College,* 501 F. 2d 31 (3d Cir., 1974), vacated on other grounds, 421 U.S. 983 (1975).

Thus, the decision of the Seventh Circuit is contrary to decisions of the Third, Fourth, Fifth and Sixth Circuits.

Any recovery of attorney fees by the plaintiffs in this cause would not come from the named defendants, who are merely nominal parties, but would come from the State Treasury. In fact, the Order of the District Court specifically stated as follows:

> "Therefore, it is hereby ordered that the plaintiffs request for attorney fees is granted and the defendants, Wayne A. Stanton, Marion Hilger, Robert Curless, Arvella Stanton, Robert G. Watson, Jr. and James Burnett, *in their official capacities* are hereby ordered to pay the sum of $2,366.00 to the plaintiffs as attorney fees . . ." (Emphasis supplied.) Pet. App. p. A-10.

As this Court said in *Ford Motor Co. v. Department of Treasury of State of Indiana,* 323 U.S. 459 (1945) at page 464:

> ". . . When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."

That statement was cited with approval in the case of *Edelman v. Jordan,* 415 U.S. 651, 663 (1974) wherein this Court stated:

> "Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."

In *Fitzpatrick v. Bitzer, supra,* at page 10, this Court in discussing § 5 of the Fourteenth Amendment to the Constitution of the United States, held:

> ". . . In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. See *Edelman v. Jordan, supra; Ford Motor Co. v. Department of Treasury, supra.*

III

"In No. 75-283, the state officials contest the Court of Appeals' conclusion that an award of attorney's fees in this case would under *Edelman* have only an "ancillary effect" on the state treasury and could therefore be permitted as falling outside the Eleventh Amendment under the doctrine of *Ex parte Young, supra.* 415 U.S., at 667-668. We need not address this

> question, since, given the express congressional authority for such an award in a case brought under Title VII, it follows necessarily from our holding in No. 75-251 that Congress' exercise of power in this respect is also not barred by the Eleventh Amendment . . ."

The case involved herein was brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983. Neither at the time of the passage of the original act nor at any time since has Congress seen fit to provide for the recovery of attorney fees to a prevailing litigant. Therefore, since there is no statutory authorization permitting the recovery of attorney fees from the State under § 1983, the State is entitled to invoke its Eleventh Amendment immunity.

That immunity *prohibits* a monetary award against a state, and obviates any need to discuss an "ancillary effect" on a state treasury that such an award might have. The State does realize however, that certain decisions have allowed attorney fees against a state treasury on the grounds that such an award would fall within *Edelmans'* "ancillary effect." However, the State does not feel the term "ancillary effect" means anything other than what this Court stated in discussing *Graham v. Richardson*, 403 U.S. 365 (1971) and *Goldberg v. Kelly*, 397 U.S. 254 (1970) in *Edelman*, 415 U.S. at 667-668:

> ". . . But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. *State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary*

> *effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young, supra.*

But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. *It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard.* While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of monetary loss resulting from a past breach of a legal duty, on the part of the defendant state officials. (Emphasis supplied.)

Thus, the term "ancillary effect" does not encompass all expenses, costs and fees of a prevailing litigant, but only that expense necessary for the State to prospectively comply with a court's order.

The State would also submit that the finding of a lack of good faith on the part of the Petitioners herein does not overcome the Eleventh Amendment bar to an award of attorney fees against the State Treasury in the absence of statutory authorization. While a lack of good faith has traditionally been an exception to the American rule prohibiting attorney fees, that exception does not overcome the bar of the Eleventh Amendment so as to operate against a state.

CONCLUSION

For these reasons, the decision of the Seventh Circuit must be reserved.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

DONALD P. BOGARD
Executive Assistant Attorney General

DAVID A. MILLER
Deputy Attorney General

Attorneys for Petitioners

Office of Indiana Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-5514